No. 11907

United States
Circuit Court of Appeals
For the Ninth Circuit

JOHN R. QUINN, County Assessor and H. L. BYRAM, County Tax Collector, of Los Angeles County,

Appellants,

vs.

AERO SERVICES, INC., a corporation, Debtor.

Appellee.

APPELLANTS' REPLY BRIEF

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WESTERN PRINTING COMPANY, WHITTIER

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APPELLANTS' REPLY BRIEF

Introduction: Summary of Reply Argument

The County Tax Officers' reply to the brief of the Debtor (Appellee) may be briefly stated. First, the Debtor is laboring under a fundamental misconception of the nature and the scope of the limitation on the power of the Bankruptcy Court under Section 64a(4) over tax claims imposed by *Arkansas Corporation Com. v. Thompson* (1941), 313 U. S. 132, 61 S. Ct. 888, 85 L. Ed. 1244. This limitation is not simply one of res judicata; it is rather a restriction upon the *power* of the Bankruptcy Court to act under Section 64a(4). Secondly, the Debtor fails to recognize that an opportunity for a final quasi judicial determination

is the equivalent in legal effect to such a determination. Thirdly, the cases relied upon by the Debtor to support his position are plainly inapplicable to the situation here presented. Fourthly, this Honorable Court has already indicated in *Kelly v. United States* (1937), (C. C. A. 9), 90 F. 2d 73, the correctness of our position.

Argument

I.

The Rule of the Arkansas Case Is a Limitation Upon the Power of the Bankruptcy Court Over Tax Claims.

The Debtor would have this Court believe that the rule of *Arkansas Corporation Com. v. Thompson, supra,* 313 U. S. 132, 61 S. Ct. 888, 85 L. Ed. 1244, is simply one of res judicata. The plain language of the opinion in that case dispels such a narrow interpretation. Mr. Justice Black spoke as follows at pages 138, 139:

> "This case raises questions concerning the right and *power* of a federal bankruptcy court to revise and redetermine for state tax purposes the property value of a railroad (Missouri Pacific) in reorganization under Section 77 of the Bankruptcy Act, 11 U. S. C. A. Section 205, the state (Arkansas) having already determined such value through its own taxing officials and in accordance with

the procedure prescribed by valid state legislation. . . .

" . . . For we are of opinion that the congressional language giving to the bankruptcy court *power* to determine the 'amount or legality' of taxes does not mean that the court is given *power* to redetermine and revise the property value finally fixed by a state under the circumstances revealed by the trustee's petition, even though that value is the basis used in computing the amount of taxes 'legally due and owing.' " (Italics ours.)

Clearly the Supreme Court was talking in terms of the power of the Bankruptcy Court and the extent thereof rather than simply of res judicata. This interpretation is confirmed by the words of the Supreme Court in the later case of *Gardner v. New Jersey* (1947), 329 U. S. 565, 67 S. Ct. 467, 91 L. Ed. 504, which we quoted in our initial brief at pages 20 to 21 thereof. There the Court, speaking through Mr. Justice Douglas, said at page 578:

"*Third.* We held in *Arkansas Corp. Commission v. Thompson,* 313 U. S. 132, 85 L. Ed. 1244, 61 S. Ct. 888, 45 Am. Bankr. Rep. (N. S.) 462, *supra,* that the reorganization court *lacked the power* under Sec. 77 to redetermine for state tax purposes the property value of a railroad where that value had already been determined in state proceedings which afforded ample protection to the railroad's rights. We adhere to that decision. . . . " (Last italics ours.)

II.

There Was a Valid and Final Quasi Judicial Determination of the Challenged Assessment

At page 4 of the Debtor's (Appellee) brief, immediately following its quotation from our initial brief, the Debtor argues that "there is nothing in the record before the court to indicate a judicial determination by the Assessor or County Board of Equalization. . . . " This argument is without foundation in that it ignores what the Bankruptcy Court itself conceded in its opinion, (T. R. 74, lines 9, 10) *that the opportunity for a quasi judicial hearing is the equivalent in law of such a hearing.* The record shows that the Debtor failed to avail itself of its right to such a hearing before the County Board of Equalization (T. R. 40). Our initial brief conclusively demonstrates that the procedure of the County Board of Equalization constituted an opportunity for a final quasi judicial determination within the meaning of the Arkansas rule. The Debtor, having failed to avail itself of such an opportunity, is now clearly estopped to claim that its own laches should afford it the right to a redetermination by the Bankruptcy Court. (*Commonwealth of Pennsylvania v. Aylward* (1946), (C. C. A. 8), 154 F. 2d 714, 717; *In re Ingersoll Co.* (1945), (C. C. A. 10), 148 F. 2d 282, 284.)

III.

Appellee's Cases Are Inapplicable

The cases relied upon by the Debtor (Appellee) are without application to the situation here presented. *Taylor v. Sternberg* (1935), 293 U. S. 470, 55 S. Ct. 260, 79 L. Ed. 599, is concerned with the Bankruptcy Court's exclusive jurisdiction over the property of the bankrupt and has nothing to do with the question involved here—the power of the Bankruptcy Court under Section 64a(4) over tax claims. *New Jersey v. Anderson* (1906), 203 U. S. 483, 27 S. Ct. 137, 51 L. Ed. 284, and *In re Monongahela Rye Liquors* (1944), (C. C. A. 3), 141 F. 2d 864, state the sound rule that where there has been no quasi judicial determination of the assessment, the Bankruptcy Court has the power under Section 64a(4) to redetermine the assessment. Obviously this rule has no application to the instant case where a valid quasi judicial determination was made.

In *Lyford v. City of New York* (1943), (C. C. A. 2), 137 F. 2d 782, the quasi judicial determination of the local taxing agency had not been completed in almost five years and therefore it was deemed proper for the Bankruptcy Court to redetermine the challenged assessment under those circumstances. However, in the present case there has been no laches on the part of the County Tax Officers; the Lyford case is consequently inapplicable.

IV.

The Kelly Case Establishes the Correctness of Our Position

This Honorable Court decided the case of *Kelly v. United States, supra,* 90 F. 2d 73, over ten years ago and its conclusion in that case demonstrates the soundness of our position in this case. A comparison of the chronology of the essential operative events in the two cases establishes this.

The relevant chronology of the Kelly case is as follows. On January 4, 1934, the Board of Tax Appeals rendered its decision sustaining certain federal income tax determinations of the Collector of Internal Revenue (p. 74). On January 12, 1934, the Commissioner made an assessment based upon these determinations (p. 74). On February 9, 1934, the taxpayer was adjudicated a bankrupt (p. 75). On April 4, 1934, the B. T. A.'s decision became final (p. 76). On June 1, 1934, the United States presented to the Bankruptcy Court its claim for taxes and interest based on the aforementioned assessment of January 12th (p. 75). On June 18, 1934, the Trustee filed his objections to the claim (p. 75). These objections were the same as those presented to the B. T. A. (p. 75). However, the Referee held a hearing on them and thereafter disallowed the claim of the United States (p. 75). On review the Bankruptcy Court reversed its Referee and the case was then appealed to this Court (p. 75). This Court, speaking through Judge Mathews, said at page 76:

> " . . . The question here presented is whether the Board's decision was conclusive on the bankruptcy court. We think it was. . . .
>
> "Appellant relies also on section 64a of the Bankruptcy Act, . . .
>
> "There is no merit in appellant's contention that, under this section, the bankruptcy court could and should have determined the question which he attempted to raise by his objections to the Government's claim. Having been previously determined by a final decision of the Board of Tax Appeals, that question did not and could not 'arise' in the bankruptcy court."

A comparison of the exact chronologies of the Kelly case and of this case is most instructive. In both cases bankruptcy intervened before the quasi judicial determination involved became final. In the Kelly case the taxpayer was adjudicated a bankrupt almost two months before this finality attached. In our case the Debtor initiated bankruptcy proceedings somewhat less than two months before such finality. (T. R. 13-14; California Rev. & Tax. Code, Sec. 1614.) Likewise, in both cases the quasi judicial determination became final long before application was made to the Bankruptcy Court for redetermination. In the Kelly case this interval was about two months and a half, while in our case it was almost five months.

It is submitted that the Kelly case is substantially on all fours with our case in its essential operative facts and should therefore be followed here. The only difference between the two cases is that in the Kelly

case the quasi judicial determination was made before bankruptcy, while in our case such determination was made after bankruptcy. However, under the Arkansas rule the quasi judicial determination does not operate as a bar to the power of the Bankruptcy Court under Section 64a(4) *unless the determination has become final.* This factual distinction is, therefore, without legal consequence. This being true, we see no reason why the Kelly case should not be decisive of the instant case. Furthermore, it should be emphasized that if the intervention of bankruptcy has the legal effect that the Debtor here would give it, the Kelly decision would have to be held erroneous since there bankruptcy did intervene before finality attached.

Conclusion

It is respectfully submitted that a valid and final quasi judicial determination of the challenged assessment having been made some five months prior to the application for redetermination thereof by the Bankruptcy Court, the Bankruptcy Court lacked the power at that time to redetermine the assessment under the rule laid down in *Arkansas Corporation Com. v. Thompson, supra,* and reiterated in *Gardner v. New Jersey, supra.*

Respectfully submitted,

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